OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 25 May 1988 *

Mr President,
Members of the Court,

1. By order of 16 December 1987 the Court decided to join, for the purposes of the oral procedure and the judgment, the 10 cases in which the applicants seek the annulment of Commission Decision 85/202/EEC of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty.[1] Five months earlier, on 8 July 1987, the Court had considered it appropriate to separate from the substance, in which agreements, decisions and concerted practices allegedly adopted by the addressees of the Commission's decision — all of which have their registered office outside the Community — were called in question, the issue of the Community's jurisdiction to apply the competition rules of the Treaty to undertakings in non-member countries and the issue, specific to one of those cases, of the relationship between the Free Trade Agreement concluded with Finland and Article 85 of the EEC Treaty.[2]

2. The parties to the proceedings and the United Kingdom, which, by order of 9 October 1985, was granted leave to intervene in support of the Commission's conclusions in the six cases in which the Commission's jurisdiction was challenged as from the time when the applications were lodged, submitted their observations on the question of jurisdiction on 12 January 1988. That is the issue with which this Opinion is concerned.

3. It is the basis on which the Commission relied in its contested decision in order to establish its jurisdiction — namely the location of the effects[3] — which is challenged by the applicants and disapproved of by the United Kingdom. Whatever its position on this matter may have been in other contexts and even if, as some have been at pains to point out, the Commission has tended in its documents to rely at times on the location of the effects and at other times on the location of the anti-competitive conduct, it seems to me that it must be on the basis of the former that the issue of Community jurisdiction is decided.

4. In that respect, I differ with the United Kingdom, which has asked the Court to resolve this dispute by holding that this case involves the exercise of territorial jurisdiction, which is accepted both by Community law and by international law.

5. The opponents of the effects doctrine have sought to make out their case against it on the basis of arguments derived from both Community law and international law. Thus

* Translated from the French.

1 — OJ L 85, 26. 3. 1985, p. 1.

2 — Apart from the argument concerning the Free Trade Agreement concluded with Finland, which is specific to Case 89/85, the applicants in that case, like most of the other applicants, challenge the Commission's jurisdiction to apply the Community rules of competition solely on the basis of the doctrine known as 'the location of the effects'. I would point out, however, that the applicant in Case 104/85 challenged the Commission's jurisdiction only at the hearing, and the applicant in Case 116/85 did not raise any objections to the Commission's jurisdiction, explaining in a letter of 29 October 1987 its initial inaction by reference to the consideration that the Court would have to examine that issue of its own motion, although it concurred on that point with the arguments submitted by the other applicants. At the hearing it reaffirmed its position and deferred to the wisdom of the Court on that issue. The applicant in Case 117/85 did not raise the objection that the Court lacked jurisdiction and, at the hearing, endorsed the arguments of the other applicants.

3 — Paragraph 79 of the contested decision.

the objection to the Commission's decision is that neither Community law nor international law authorizes the application of the Community competition rules to undertakings established outside the Community solely by reason of the effects produced within the Community.

6. Once those two aspects have been considered, it will be necessary to review the principles laid down in the particularly rich United States case-law in this field. I shall then suggest the criteria to be adopted as the basis for the Community's jurisdiction over undertakings established outside the Community and, taking those criteria into account, I shall deal with the special circumstances of the KEA. Finally, I shall examine the specific problem of the relationship between the Free Trade Agreement concluded between the Community and the Republic of Finland and Article 85 of the EEC Treaty.

I — The effects doctrine in the light of Community law

7. Whatever the specific features of each of the cases now before the Court, the challenge to the Community's jurisdiction to apply its competition rules to undertakings established outside the Community rests on two considerations. In the first place, it is said that there is nothing in the wording of Article 85 of the Treaty to allow it to be extended to cover undertakings outside the Community solely by reason of anti-competitive effects produced within the territory of the Community. Secondly, it is suggested that the case-law of the Court can be construed as rejecting the effects doctrine. Let me state at once that I will advise the Court to uphold neither of those objections.

1. *The wording of Article 85*

8. The wording of Article 85 of the Treaty offers general support for the proposition that Community competition law is applicable, by its very essence, whenever anti-competitive effects have been produced within the territory of the Community. The effect on trade between Member States constitutes the demarcating criterion between Community jurisdiction and national jurisdiction in the matter. It is agreements, decisions and concerted practices which have 'as their object or effect the prevention, restriction or distortion of competition within the common market' that are prohibited and declared incompatible with the Treaty.

9. In the light of that provision, the vast majority of academic writers take the view that it is neither the nationality nor the geographical location of the undertaking but the location of the anti-competitive effect which constitutes the criterion for the application of Community competition law.[4]

10. In fact, it is uncertain whether the 'effect' referred to in Article 85 of the Treaty constitutes, strictly speaking, a basis of jurisdiction. This concept, like that of 'object',[5] quite clearly makes it possible to establish an infringement of the substantive

4 — G. Bernini: 'Les règles de concurrence' in *Trente ans de droit communautaire*, Office des publications officielles des Communautés européennes, 1982, p. 345, in particular p. 375. B. Goldman: *Les champs d'application territoriale des lois sur la concurrence*, RCADI, 1969 (III), p. 635, in particular p. 676 *et seq.*, and *Les effets juridiques extraterritoriaux de la politique de la concurrence*, RMC, 1972, p. 612, in particular pp. 614 and 615. J. M. Bischoff and R. Kovar: *L'application du droit communautaire de la concurrence aux entreprises établies à l'extérieur de la Communauté*, JDI (Clunet), 1975, in particular p. 684. J. Schapira, G. Le Tallec, J.-B. Blaise: *Droit européen des affaires*, PUF, Thémis, 1984, p. 245. J. Mégret, J.-V. Louis, D. Vignes and M. Waelbroeck: *Le droit de la Communauté économique européenne*, Vol. 4: 'Concurrence', éditions de l'université de Bruxelles, 1972, pp. 110 and 111. J. Soufflet: *La compétence extraterritoriale du droit de la concurrence de la communauté économique européenne*, JDI (Clunet), 1971, p. 487, in particular p. 491.

5 — L. Focsaneaunu: *Pour objet ou pour effet*, RMC, 1966, p. 862.

law of competition in cases where Community jurisdiction itself is indisputable. However, it may be relied upon to serve a different function, as a criterion of jurisdiction, and its scope is then not necessarily identical to that of the effect in substantive law. I shall return to this point in due course.

2. *Principles laid down by the Court in its case-law*

11. Although the Court has not, in its decisions to date, formally upheld the effects doctrine with regard to the application of competition law to undertakings outside the Community, that does not imply that it rejects the doctrine.

12. The cases most frequently cited in this connection are the so-called 'Dyestuffs' cases.[6] In its judgments of 14 July 1972, although Mr Advocate General Mayras had suggested that the Court adopt the criterion of the effects, albeit the qualified effects, in order to establish the Community's jurisdiction over undertakings outside its territory, the Court preferred to base such jurisdiction on the unity of the undertaking. But that certainly does not mean that the location of the effects would not constitute a sufficient basis for jurisdiction.[7] As Professor Goldman has pointed out, precisely in connection with that judgment, 'no inferences may be drawn from the silences of the Court'.[8]

13. Nor is it possible to infer from the Court's judgments in that field conclusive arguments in favour of the effects doctrine, even though some of those judgments contain statements which may go some way towards supporting it. Thus, for instance, when the Court stated in its judgment in *Beguelin* that 'the fact that one of the undertakings which are parties to the agreement is situated in a third country does not prevent application of . . . [Article 85 of the Treaty] . . . since the agreement is operative on the territory of the common market',[9] the fact must not be altogether disregarded that that case concerned an agreement granting an exclusive concession and that one of the parties to it was established within the Community.

14. In other words, the case-law of the Court concerning *competition law* is not conclusive either for or against the effects doctrine as the criterion for the applicability of Community law to undertakings situated outside the Community.

15. Conversely, support for the application of the effects doctrine may be found in *Walrave* v *Union cycliste internationale*. In that judgment, regarding the principle of non-discrimination on grounds of nationality in connection with the Treaty rules on freedom of movement for workers and the provision of services, the Court stated that:

'by reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of *the place where they take effect*, can be located within the territory of the Community'.[10]

6 — Case 48/69 *Imperial Chemical Industries* [1972] ECR 619; Case 52/69 *J. R. Geigy AG* [1972] ECR 787; Case 53/69 *Sandoz* AG [1972] ECR 845.

7 — See J.-M. Bisschoff and R. Kovar, *supra*, p. 684.

8 — B. Goldman: 'International Law Association', *Report of the 55th Conference*, New York, 1972, p. 128.

9 — Judgment of 25 November 1971 in Case 22/71 [1971] ECR 949, paragraph 11 of the decision.

10 — Judgment of 12 December 1974 in Case 36/74 [1974] ECR 1405, paragraph 28 of the decision, emphasis added.

16. That case was concerned with a rule of the Union cycliste internationale, whose seat was in Geneva. In the proceedings before the Court, the Union cycliste internationale sought to rely on *Geigy*[11] and *Continental Can*[12] against the effects doctrine, on the ground that that criterion had not been adopted by the Court in those judgments.

17. That argument reveals the full significance of the Court's answer. Some writers have drawn the conclusion that the effects doctrine is a basis for asserting Community jurisdiction which, although enunciated in another context, may be relied upon in the field of competition.[13] If the position adopted by the Court in *Walrave* may be transposed to competition law, and I see no reason why it should not, it is legitimate to argue that, far from repudiating the effects doctrine, the Court has no hesitation in endorsing it.

18. However, that finding alone does not suffice. In a matter of this kind, it is necessary to ascertain whether or not such a criterion is in conformity with the requirements and the practice of international law.

II — The effects doctrine in the light of international law

19. The two undisputed bases on which State jurisdiction is founded under international law are *territoriality* and *nationality*.[14] The former confers jurisdiction on the State in which the person or the goods in question are situated or the event in question took place. The latter confers jurisdiction over nationals of the State concerned.

20. Territoriality itself has given rise to two distinct principles of jurisdiction:

(i) *subjective* territoriality, which permits a State to deal with acts which originated within its territory, even though they were completed abroad,

(ii) *objective* territoriality, which, conversely, permits a State to deal with acts which originated abroad but which were completed, at least in part, within its own territory.

21. The principle of objective territoriality has played a decisive role in the extension of national jurisdiction in the field of competition. From it is derived the effects doctrine, which, in order to deal with the effects in question, confers jurisdiction upon a State even if the conduct which produced them did not take place within its territory.

22. Is the location of effects doctrine, as a basis for jurisdiction, consistent with the rules of international law? In order to answer that question, it is necessary first of all to consider the very nature of international law. Is it law which confers powers, so that a State seeking to exercise its jurisdiction must establish the existence of a permissive rule of international law? Or is it, on the contrary, a law which respects all the powers of the State — a corollary of sover-

11 — Judgment of 14 July 1972 in Cae 52/69 [1972] ECR 787, at p. 826.

12 — Judgment of 21 February 1973 in Case 6/62 [1973] ECR 215, at p. 241.

13 — P. Delannay: *Observations sous l'arrêt 36/74, Walrave et Koch*, CDE, 1976, p. 209, in particular p. 224.

14 — See, for instance, R. Higgins: 'The legal bases of jurisdiction', in C. J. Olmstead (Ed.): *Extraterritorial application of laws and responses thereto*, Oxford, ILA and ECS, 1984, p. 3.

eignty — and merely sets certain limits to the exercise of such sovereignty which, in the absence of prohibitive rules, remains intact?

23. Academic writers are divided on that point. The discussion has revolved essentially around the significance and scope of the *Lotus* judgment, delivered on 7 September 1927 by the Permanent Court of International Justice.[15] That judgment, adopted by the President's casting vote, states in particular that international law does not prohibit a State

'from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principle which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States . . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.[16]

The full force of that statement becomes apparent if it is read in conjunction with the Permanent Court's declaration that 'international law governs relations between independent States' and that 'restrictions upon the independence of States cannot therefore be presumed'.[17]

24. The position under international law in that regard was restated and refined by Sir Gerald Fitzmaurice in his Separate Opinion in the judgment of the International Court of Justice of 5 February 1970 in *Barcelona Traction*:

'It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others — for instance in the fields of shipping, "anti-trust" legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the *existence* of limits — though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'.[18]

15 — Permanent Court of International Justice, Judgments, Orders and Advisory Opinions, Series A-J 10.

16 — Ibid., p. 19.

17 — Ibid., p. 18.

18 — International Court of Justice: *Reports of Judgments*, 'Advisory Opinions and Orders', 1970, p. 65, at p. 105.

25. Another passage in the *Lotus* judgment has been relied upon by certain writers in order to limit its scope with regard to recognition of the effects doctrine as a basis for State jurisdiction. The Permanent Court pointed out that even the courts of countries which have a strictly territorial conception of their criminal legislation interpret it in such a way as to include within its scope offences, even if committed abroad, if 'one of the constituent elements of the offence, and more especially its effects' have taken place within the national territory.[19] The Permanent Court goes on to point out in its judgment that, in that case, the act and its effects 'are, legally, entirely inseparable',[20] which has led certain writers to argue that only circumstances of that kind permit a State to exercise its jurisdiction by virtue of the principle of objective territoriality.

26. However, on the assumption that the Permanent Court wished, in so doing, to circumscribe the jurisdiction of the State based on objective territoriality to cases in which the effect produced within its territory was itself a constituent element of the offence, that would have no bearing on the application of the Community competition rules to undertakings established outside the Community. It should be recalled that Article 85 of the Treaty prohibits any agreements, decisions and concerted practices which have as their effect 'the prevention, restriction or distortion of competition within the common market'. Is not such an effect necessarily a constituent element of the offence?[21] That was the view taken by Mr Advocate General Mayras when he stated that 'in competition law the effect of the offence is in fact one of its constituent elements and probably even the essential element'.[22]

27. Accordingly, even though, for other reasons, the question has been asked 'is the *Lotus* still sailing',[23] there would appear to be no doubt that the principle thus laid down, which has admittedly been criticized by academic writers but has not so far been contradicted by international case-law, permits the conclusion to be drawn that consideration of the location of the effects as the basis of a State's jurisdiction is in conformity with the rules of international law.[24] And what is thus permissible for States must necessarily also be permissible for the Community, as a subject of international law, where the jurisdiction of the Community has been substituted for that of the Member States.

28. The jurisdiction thus conferred is 'jurisdiction to prescribe', being the power of the State to 'lay down general or individual rules through its legislative, executive or judicial bodies'.[25] It cannot be understood as constituting 'jurisdiction to enforce', which is the 'power of a State to give effect to a general rule or an individual decision by means of substantive implementing measures which may include even coercion by the authorities'.[26] That opinion is widely shared by those academic writers who accept that the effects doctrine

19 — Ibid., p. 23.

20 — Ibid., p. 30.

21 — M. Åkehurst: *Jurisdiction in international law*, BYIL, 1972-73, p. 145, in particular pp. 195 and 196; B. Goldman: *Les champs d'application territoriale des lois sur la concurrence*, RCADI, 1969 (III), p. 635, in particular p. 701.

22 — Opinion of Mr Advocate General Mayras in Cases 48, 52 and 53/69, cited above, [1972] ECR 665, at p. 694.

23 — P. Julliard: 'L'application extraterritoriale de la loi économique' in *L'application extraterritoriale du droit économique*, Cahiers du Cedin, *supra*, p. 13, in particular p. 24.

24 — In that regard, P. Demaret writes: 'The Lotus judgment was given with the smallest possible majority. But the dictum cited above corresponds to the true state of international affairs as it was in 1927 and undoubtedly still is today', in *L'extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie?* CDE, 1985, p. 1, in particular p. 26.

25 — B. Stern: *Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit*, AFDI, 1986, p. 7, in particular p. 11.

26 — Ibid.

may constitute a basis for the assertion of jurisdiction by the State. Moreover, it is essentially against measures taken pursuant to enforcement jurisdiction that some 20 countries have adopted so-called 'blocking statutes'.[27] But the question which must then be raised is whether the power to impose a fine comes within the scope of prescriptive jurisdiction or enforcement jurisdiction.

29. Where an agreement, decision or concerted practice is declared unlawful and a fine is imposed, that is generally agreed to constitute the exercise of prescriptive jurisdiction. The prohibition imposed by international law upon a State is, to adopt the wording used in *Lotus*, that ' — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State'.[28]

30. Accordingly, it is specific measures of enforcement and coercion that are excluded. However, as others have written before, 'to order is not to compel'.[29] And I, for my part, agree with the following analysis made by Professor Goldman:

'An order to pay a fine, where it penalizes events covered by the law of the forum in view of the effects which they produce within the territory of the forum . . . is indissolubly linked, like the fact giving rise to it or the finding of nullity, to the application of the law which is by definition the proper law, and to deny the court the power to make such an order would render that "prescriptive jurisdiction" nugatory'.[30]

That was the approach taken by Mr Advocate General Mayras in his Opinion in the 'Dyestuffs' cases:

'The imposition of a pecuniary sanction, the purpose of which is to suppress conduct interfering with competition, and also to prevent its continuance or renewal, should be distinguished from the recovery of a fine imposed which can only be effected, should the undertaking penalized refuse to pay, by means of a forcible execution'.[31]

31. That having been said, it is undoubtedly in United States law that are to be found the most far-reaching deliberations and efforts to determine the circumstances permitting a State to exercise its prescriptive jurisdiction in situations involving extraneous elements. That is not surprising. The *Sherman Act* dates back to 1890. It has given rise to a very considerable body of case-law and academic writing, evidencing the concern to reconcile legitimate national interests with the imperative requirements of international law and international relations. That is why I propose to refer to the most noteworthy decisions of the United States courts.

III — The principles of United States law

32. Originally, the United States courts confined themselves to the strict application of the territoriality criterion. One of the

27 — See, for instance, J. R. Atwood: 'Blocking statutes and sovereign compulsion: recent developments and the proposed Restatement', in B. E. Hawk, (Ed.): *Anti-trust and trade policies in the United States and the European Community*, Annual Proceedings of the Fordham Corporate Law Institute, New York, Matthew Bender, 1986, Chapter 16, p. 327. L. Collins: 'Blocking and clawback statutes: the United Kingdom approach', *Journal of business law*, 1986, pp. 372 and 452.

28 — *Supra*, p. 18.

29 — B. Goldman and A. Lyon-Caen: *Droit commercial européen*, Dalloz, 4th edition, 1983, p. 886.

30 — B. Goldman: *Observations sur les arrêts 'Matières colorantes'*, JDI (Clunet), 1973, p. 935.

31 — [1972] ECR 665, at. p. 701.

most celebrated dicta on this point is that of Justice Oliver Wendell Holmes in the *American Banana* case:[32] 'All legislation is prima facie territorial'. And he went on to say that, according to a general or universal rule, the legality or illegality of an act is determined exclusively by the law of the country within whose territory the act is done.

33. It was necessary to wait until 1945 and the *Alcoa* judgment[33] to see the effects doctrine laid down in its most absolute form. Until that judgment was given, undertakings established abroad were penalized in the United States only on account of their conduct within United States territory and the principle of objective territoriality, known in other branches of the law, had not been relied upon in disputes concerning competition.[34] The *Alcoa* case, which was decided by a specially constituted court, gave Judge Learned Hand occasion to state that, with regard to the interpretation of national anti-trust legislation, it is appropriate to take into consideration the limitations customarily observed by States upon the exercise of their powers. He went on, using words which still have an impact in view of the extent to which they embody the effects doctrine in its extreme form:

'It is settled law ... that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognize.'

According to Judge Learned Hand, such an application of the national rules of competition to undertakings established abroad presupposes the existence of both an element of intent and a substantive element. Thus, an act is covered by those rules only if it was intended and if it created effects, regardless of their magnitude.

34. Decisions of that kind are rare, no doubt because the cases in which there is no connecting factor other than the effect produced are themselves exceptional. However, I would refer to the judgment in *Horlogerie Suisse*.[35] Judge Cashin, relying expressly on the effects doctrine, upheld the jurisdiction of the United States authorities over the defendant which was established abroad, since the conduct of the latter had a substantial and direct effect in the United States. It is worth noting, at this juncture, the court's concern to qualify the effects.

35. That case-law, particularly in its most far-reaching form, as embodied in the terms used by Judge Learned Hand, inevitably provoked reactions and some criticism. In order to prevent conflicts which might arise, in particular, from the exercise of concurrent jurisdiction, and from the unreserved application of the effects doctrine, various proposals have been made in the United States. In that regard, I would cite the *Restatement of foreign relations law of the United States*, published in 1965 by

32 — 213 US 347 (1909).

33 — 148 F. 2d 416 (1945).

34 — A. D. Neale and M. L. Stephens: *International business and national jurisdiction*, Oxford, Clarendon Press, 1988, p. 167.

35 — 1965, *Trade cases*, paragraph 71352; 1963, *Trade cases*, paragraph 70600.

the American Law Institute, and the *Anti-trust guide for international operations*, which was issued in January 1977 on the initiative of the United States Department of Justice. The latter document refers to the concept of a substantial and foreseeable effect. The same concept of a substantial effect appears in the *Tentative draft of the Restatement (revised)* published in 1985 which requires there to be, in addition, conduct abroad which has or is intended to have a substantial effect within United States territory. The existence of an intent is, according to some writers, equivalent to the requirement of a foreseeable effect.[36]

36. In the context of this attempt to circumscribe the effects doctrine, reference should be made to the judgment of Judge Choy in the *Timberlane Lumber* case.[37] Whilst endorsing the *Alcoa* and *Horlogerie Suisse* judgments, Judge Choy considered that the efforts made so far to narrow the scope of the effects doctrine were not very satisfactory. In the first place, the concept of a substantial effect appeared to him hard to define in an international context. Secondly, the distinction between direct and indirect effects was, in his view, inappropriate in so far as it did not permit the interests of other countries to be taken into account.

37. Judge Choy came to the conclusion that, in certain circumstances, the interests of the United States were too weak and the incentive for restraint in order to preserve harmony in its international relations too strong to justify an assertion of extraterritorial jurisdiction. In order to determine whether such jurisdiction must be exercised, he laid down three cumulative criteria, the first two relating to legality, and the third relating to expediency, which he expressed in the form of three questions:

(1) Does the alleged restraint of competition affect, or was it intended to affect, the foreign trade of the United States?

(2) Is it of such a type and magnitude as to be cognizable as a violation of the *Sherman Act*?

(3) As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?

38. That third condition, which is essentially a jurisdictional *rule of reason*, includes seven elements which do not constitute an exhaustive list. They include:

(i) the degree of conflict with a foreign rule;

(ii) the nationality of the parties and the locations or principal places of business of the undertakings concerned;

(iii) the relative significance of the effects in the United States as compared with the effects produced elsewhere;

(iv) the extent to which there is an explicit purpose to harm or affect United States trade, and the foreseeability of such effect.

39. I would also cite the judgment in *Mannington Mills*,[38] in which Judge Weis, referring to and interpreting *Timberlane*

36 — See A. D. Neale and M. L. Stephens, *supra*, p. 167.

37 — 549 F. 2d 597 (9 Cir. 1977).

38 — 595 F. 2d 1287 (3 Cir. 1979).

Lumber, adds to the criteria listed therein other factors, some of which are expressly connected with foreign policy considerations. Briefly, it would appear that that position, without challenging the principle of extraterritorial jurisdiction, amplifies the conditions relating to the expediency of exercising it. I would point out, however, that in the same case, Judge Adams gave a different interpretation of the same criteria which, in his view, serve to establish the actual existence of jurisdiction and not to lay down the conditions for its exercise.

40. In that regard, United States law, as it now stands, rests on two principles. The first is that the United States will assert jurisdiction where the effects on its trade are direct, substantial and foreseeable. According to the second, the courts should assess the 'balance of interests' in order to ensure that the exercise of such jurisdiction is reasonable. [39]

41. The rule of 'judicial interest balancing' with regard to jurisdiction has not escaped critical comment. One of the most striking criticisms is that made by Judge Wilkey in *Laker Airways*. [40] In his view, the balancing of interests by the courts in order to ensure that the exercise of jurisdiction is in conformity with the rule of reason is an unsuitable approach. It requires the courts to choose between a domestic law, which is designed to protect domestic interests, and a foreign law which is calculated to thwart the application of the domestic law which allegedly threatens foreign interests.

42. Interest balancing in that context is hindered by two factors. In the first place, there are substantial limitations on the courts' ability to make, in such situations, an objective evaluation of the competing interests. Judge Wilkey expresses serious misgivings as to the extent to which a court can adequately assess the competing problems and priorities in question. [41] Secondly, he considers that interest balancing is unlikely to achieve its goal of promoting international comity in so far as its effectiveness, as a means of ascertaining the most reasonable exercise of prescriptive jurisdiction, has not been demonstrated. That approach, he stated in particular, has gained only a temporary foothold in domestic law. [42]

43. Noting that the United States courts frequently refuse to adopt that approach and that academic criticism thereof has intensified, Judge Wilkey also pointed out that there is no evidence that interest balancing constitutes a rule of international law. [43] International law does not preclude concurrent jurisdiction. If two assertions of jurisdiction are justified under international law, there is no rule of international law which permits one to be displaced in favour of the other on the ground that the latter is 'more reasonable'. [44]

44. Finally, I would point out that the 1985 *Tentative draft of the Restatement* lists eight criteria for determining the circumstances in which the exercise of jurisdiction must be

39 — A. D. Neale and M. L. Stephens, *supra*, p. 177.

40 — 731 F. 2d 909 (DC. Cir. 1984); Judge Wilkey has also criticized the judicial balancing of interests in: 'American anti-trust: adjusting conflicts with other legal systems', published in *Private investors abroad*, New York, Matthew Bender, 1985, cited by A. D. Neale and M. L. Stephens, *supra*, p. 179, Note 14.

41 — Ibid., p. 78.

42 — Ibid., p. 80.

43 — Ibid., p. 80.

44 — Ibid., pp. 83 and 84.

regarded as reasonable. Those criteria include the substantial, direct and foreseeable character of the effect, the conformity of the rule with the traditions of the international system, any interest which other States may have and the likelihood of a conflict arising therefrom.

45. In practice, therefore, it would not appear that the balancing of interests in accordance with the criteria formulated in *Timberlane Lumber* and *Mannington Mills* has made it possible to elicit a jurisdictional rule of reason. With one exception — a United States writer has pointed out — no court has refused to exercise its jurisdiction as a result of the analysis put forward in those judgments. [45] For his part, Professor Mann considers that the balancing of interests is, in law, a 'bad and misleading guide'. [46] In his view, a court cannot have a discretion to decide whether it should exercise its jurisdiction. If, construed in the light of international law, a statute applies, a court is not entitled to reject it. If the rules of international law preclude its application, a court has no discretionary power to apply it. Consequently, the distinction between the existence and the exercise of jurisdiction, on the one hand, and, on the other, the recognition of a discretion to refrain from exercising existing jurisdiction constitute a misleading approach which should not be followed. [47]

46. However subtle and fertile it may be, therefore, United States law, while casting some light on this problem, evidently does not provide jurisdictional criteria that are sufficiently tried and tested and precise enough to be adopted without further qualification. Hence it is for the Court, with the aid in particular of learned writings on the matter, to define the circumstances in which the Community may assert jurisdiction to apply its competition rules to undertakings established outside its territory.

IV — Suggested jurisdictional criteria

47. The difficulties encountered in this area illustrate clearly that territoriality, as a connecting factor, does not make it possible to resolve all the problems connected with the scale and nature of contemporary international trade. According to Professor Mann, an inflexible territoriality principle is no longer suited to the modern world. [48] The same view is taken by Professor Prosper Weil in the following passage:

'The picture before us is that of an international society made up of adjacent cells, separated by frontiers; the concept of territory, which lies at the very heart of the concept of territoriality, illustrates that division between separate entities by physical and geographical boundaries. But it is clear . . . that frontiers are not only barriers but also crossing points and economic life makes light of such barriers.' [49]

48. This assessment has led different writers to devise different criteria for the extraterritorial application of laws. Sir Robert Jennings, for example, considers that under

45 — J. P. Griffin: 'Possible resolutions of international disputes over enforcement of US anti-trust laws', 18, *Stanford journal of international law*, Issue 2, 1982, cited by A. D. Neale and M. L. Stephens, supra, p. 76, note 14.

46 — F. A. Mann: *The doctrine of international jurisdiction revisited after twenty years*, RCADI, 1984 (III), p. 12, in particular pp. 30 and 31.

47 — F. A. Mann, ibid., pp. 87 and 88.

48 — *Supra*, RCADI, 1964, p. 126.

49 — P. Weil: *L'application extraterritoriale du droit économique*, Cahiers de Cedin, Montchrestien, 1987, p. 11.

international law a State is entitled to exercise extraterritorial jurisdiction where its legitimate interests are concerned but that it may not abuse that right. There is abuse where the exercise of extraterritorial jurisdiction constitutes interference with the exercise of the local territorial jurisdiction. [50] According to Professor Mann, the real problem is that of identifying what he calls the 'legally relevant facts' [51] and the State whose connection with those facts is of such a kind as to render the assertion of jurisdiction fair and reasonable. [52] Advocating that jurisdiction should be based on 'closeness of connection', Professor Mann considers

'that a State has (legislative) jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of interdependence)'. [53]

Professor Mann points out at the same time that a mere political, economic, commercial or social interest does not constitute a close connection. In the case, more particularly, of the law of competition, he considers that the effect, whether intended, foreseeable or, *a fortiori*, unanticipated, cannot establish a connection of that kind. [54]

50 — R. Y. Jennings: *Extraterritorial jurisdiction and the United States anti-trust laws*, BYIL, 1957, p. 146, in particular p. 153.

51 — F. A. Mann: *The doctrine of jurisdiction in international law*, RCADI, 1964, p. 7, in particular p. 45.

52 — Ibid., p. 44.

53 — Ibid., p. 49.

54 — Ibid., p. 104.

49. Other writers suggest that the jurisdiction of the State in which 'the primary effect' of the act is felt should be recognized. [55] In order to determine whether the effect is primary or secondary, it is necessary to take a twofold factor into consideration: is the effect produced within the State concerned more direct and more substantial than the effect produced in other States. It is suggested that that approach permits jurisdiction to be exercised only by States having a legitimate interest therein. [56] Finally, it is generally acknowledged that international law does not preclude concurrent jurisdiction. I would point out, however, that, according to some writers, the development of customary international law leads to the emergence of certain specific limitations on the extraterritorial exercise of a State's jurisdiction. Thus, international law would prohibit the extraterritorial application of domestic law where it might give rise to conflicting obligations, [57] or provoke conflicts of jurisdiction. [58]

50. In my view, those various concerns are, for the most part, taken into account by the adoption of the criterion of qualified effect. That criterion, which does not conflict with any prohibitive rule of international law, has gained wide acceptance in the practice of States. [59] Moreover, it is, on objective grounds, particularly appropriate in view of the specific nature of competition law, [60] as a law designed to regulate market conditions and safeguard 'ordre public' in the economic context. [61] It is on the basis of

55 — In particular, M. Akehurst, *supra*, p. 198.

56 — Ibid., p. 201.

57 — P. Julliard: 'Application extraterritoriale de la loi économique' in *L'application extraterritoriale du droit économique*, *supra*, p. 13, in particular p. 31.

58 — B. Stern, *supra*, p. 15.

59 — L. Idot: *Le contrôle des pratiques restrictives de concurrence dans les échanges internationaux*, Université de droit, d'économie et des sciences sociales de Paris (Paris II), thèse, 1981, ronéo, in particular p. 89 *et. seq.*

60 — J. M. Bischoff and R. Kovar, *supra*, p. 700.

61 — P. Eeckman: *L'application de l'article 85 du traité de Rome aux ententes étrangères à la CEE, mais causant des restrictions à la concurrence à l'intérieur du marché commun*, RCDIP, 1965, p. 499, in particular p. 519.

those considerations and of the criteria of international law that it is necessary to define the characteristics of an effect whose location justifies the assertion of prescriptive jurisdiction over undertakings established outside the Community.

51. According to some writers, such effects should correspond to those which are covered where the interference with competition is the result of conduct within the territory of the State which claims jurisdiction.[62] However, as I have pointed out, it is unclear whether the concept of effect provided for in Article 85 of the EEC Treaty in order to establish the *existence* of an infringement of the competition rules is identical to that required by Community law, and accepted by international law, in order to *determine whether there is jurisdiction* over undertakings established outside the Community.

52. According to the substantive provisions of Community law, the restriction of competition must be 'perceptible'[63] or 'appreciable'.[64] The adverse affect on competition may be either direct or indirect and objectively or reasonably foreseeable.[65] Those are the characteristics of the effect envisaged as a constituent element of interference with freedom of competition within the Community.

53. In my view, not all of those characteristics have to be adopted if the effect is taken as the criterion of extraterritorial jurisdiction. The most important reservation in that regard concerns indirect effect.[66] I would remind the Court that Mr Advocate General Mayras suggested, in his Opinion in the 'Dyestuffs' cases, the adoption of the criterion of the direct and immediate, reasonably foreseeable and substantial effect.[67] I agree with that solution and, for the reasons which he sets forth, I would adopt his analysis which is as follows:

'Surely the Commission would be disarmed if, faced with a concerted practice, the initiative for which was taken and the responsibility for which was assumed exclusively by undertakings outside the common market, it was deprived of the power to take any decision against them? This would also mean giving up a way of defending the common market and one necessary for bringing about the major objectives of the European Economic Community.'[68]

54. The qualified effects are generally adopted as the criterion conferring jurisdiction. The *Restatement* refers to substantial and foreseeable effect. At its 55th Conference in New York in August 1972, the International Law Association adopted a resolution on the application of the principles of international law in the field of restrictive practices.[69] According to Article 5 of that resolution, a State has jurisdiction to prescribe rules of law governing conduct that takes place outside its territory and causes an effect within its territory provided that three conditions are satisfied: (a) the conduct and its effect are constituent elements of a restrictive practice, (b) the effect within the territory is substantial, and (c) it occurs as a direct and primarily intended result of the conduct outside the territory. It is noteworthy that this resolution was preferred to that submitted

62 — P. Demaret, *supra*, p. 33.

63 — J. Mégret, J.-V. Louis, D. Vignes and M. Waelbroeck: *Le droit de la Communauté économique européenne*, Editions de l'université de Bruxelles, 1972, vol. 4, 'Concurrence', p. 20.

64 — Ibid., p. 21.

65 — B. Goldman and A. Lyon-Caen: *Droit commercial européen*, Dalloz, 4th edition, p. 551.

66 — J. M. Bischoff and R. Kovar, *supra*, in particular p. 706 *et seq.*

67 — (1972) ECR 665, at pp. 699 and 700.

68 — Ibid., p. 702.

69 — The International Law Association: *Report of the 55th Conference held in New York, 21 August to 26 August 1972*, p. 138.

by the Committee on the Extraterritorial Application of Restrictive Trade Practices, according to which international law does not permit a State to assume or exercise extraterritorial prescriptive jurisdiction solely on the basis that conduct which took place abroad produces effects or repercussions within its territory.[70] Hence, within that academic forum, the proposal rejecting the effects doctrine was discarded in favour of a resolution supporting the adoption of the qualified effect criterion.

55. Admittedly, in its observations, the United Kingdom, referring to the *aide-mémoire* of 20 October 1969 which it submitted to the Commission regarding the 'Dyestuffs' cases, has maintained that the territorial basis alone can justify the Community's assertion of jurisdiction in these cases. It therefore considers that the principle laid down in the 'Dyestuffs' cases must apply not only to subsidiaries but also to other intermediate establishments, situated within the Community, whose conduct within the Community has had an anti-competitive effect there. In those circumstances, according to the United Kingdom, it is merely the exercise of territorial jurisdiction which is involved.

56. In the light of all the foregoing considerations, I do not believe that I can advise the Court to take that approach. Moreover, the applicants deny that there is a territorial connection with the Community such as to enable it to assume jurisdiction over them. They claim that any conduct which may be attributed to them took place outside the Community. The applicants add that their various representatives acted independently and that none of those representatives' activities may be imputed to the applicants. Be that as it may, it serves no purpose in my view to enter into a discussion on the nature of the legal relationship between the applicant companies and their various etablishments within the Community.

57. As we have seen, there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect. Nor does the concept of international comity, in view of its uncertain scope, militate against that criterion either.[71]

58. In the absence of any such prohibitive rule and in the light of widespread State practice, I would therefore propose that in view of its appropriateness to the field of competition, it be adopted as a criterion for the jurisdiction of the Community.

59. Two specific problems remain to be considered, namely the position of the KEA and the significance as regards the Finnish applicants of the Free Trade Agreement concluded between Finland and the Community.

V — The position of KEA

60. KEA is an association of United States undertakings which — the Commission essentially alleges — made recommendations on prices which were followed by its members and contributed to the transparency of the market, thereby favouring concertation with other producers unconnected with the association. In general

70 — Ibid., p. 175.

71 — On the concept of international comity, see L. Oppenheim: *International Law*, 8th edition, H. Lauterpacht, Longmans, Green and Co., Vol. 1, p. 33 *et seq.*; E. Nys: *Le droit international*, 2nd edition, 1904, Vol. 1, p. 201 *et seq.*; H. E. Yntema: 'The comity doctrine', *Michigan law review*, 1966-67, Vol. 65, p. 1.

terms, KEA is said to have constituted the framework for concertation between the producers concerned.

61. If it is satisfied, the criterion which I suggest the Court should adopt is such as to justify, in principle, the assertion of jurisdiction by the Community even though KEA does not have any branches, subsidiaries or agencies in the Community, that is to say it lacks the type of territorial connection which, according to the United Kingdom, constitutes the sole basis for the exercise of jurisdiction by the Community.

62. Nor does the nature of the activities carried on by KEA, which has not itself traded in the Community, constitute in my view an obstacle to the applicability of Community law. The fact that an association of undertakings does not engage, as such, in economic activities does not preclude the application of the competition rules to it. I would refer, in that regard, to the general thrust of the judgment in *Van Landewyck* where criticism was levelled at the applicability of Article 85 (1) of the EEC Treaty to a recommendation inasmuch as it had been issued by a non-profit-making association; the Court stated that:

'It is apparent from Article 8 of the statutes of Fedetab that the decisions taken by it are binding on its members. Further, Article 85 (1) also applies to associations in so far as *their own activities* or *those of the undertakings belonging to them* are calculated to *produce the results which it aims to suppress.* Since several manufacturers have expressly stated that they are complying with the provisions of the recommendation, it cannot escape Article 85 of the Treaty simply because it has been made by a non-profit-making association.' [72]

63. Admittedly, in this case, KEA's statutes provide that its members are in principle free to depart from the recommended price. However, the Commission contends that the existence of a procedure to be set in motion within the association in cases where members do not charge the prices thus determined is difficult to reconcile with that option. It maintains, moreover, that KEA's recommendations were indeed complied with in 1975 and 1976. It must be pointed out, at this juncture, that the Court accepts the application of Article 85 to a recommendation which is made by an association of undertakings and is described as non-binding if it is clear from the facts of the case that 'regardless of what its precise legal status may be', it constitutes 'the faithful reflection of the applicant's resolve to coordinate the conduct of its members'. [73] Clearly, the examination involved is concerned with the substance of the case but, in any event, the Court will have to recognize the principle that Article 85 does apply to the association in question.

64. Finally, I would point out that it seems premature to consider the submission that the contested decision is invalid on the ground that it states that all its addressees export their goods directly to the Community or trade there, although that is not the case so far as KEA is concerned. That is not, strictly speaking, a problem of jurisdiction but a problem concerning the statement of reasons which will have to be considered at a later stage in the proceedings.

65. KEA was set up under the Webb Pomerene Act. That statute, as we know,

72 — Judgment of 29 October 1980 in Case 209/78 [1980] ECR 3125, emphasis added; a similar solution was adopted by the Court in its judgment of 8 November 1983 in Case 96/82 NVIAZ v Commission (1983) ECR 3369.

73 — Judgment of 27 January 1987 in Case 45/85 *Verband der Sachversicherer* [1987] ECR 405, paragraph 32.

authorizes the establishment of export associations in derogation from United States anti-trust legislation. However, it is not, in my view, of such a nature as to call in question the prescriptive jurisdiction of the Commission in so far as it does not in any circumstances require the undertakings concerned to engage in practices restricting exports.

66. In that regard, in a document submitted in these proceedings[74] by the applicants themselves, Professor Turner points out, in accordance with the generally accepted rules of international law, that it is appropriate to distinguish between authorization and obligation: 'Existing international law draws a line between sovereign compulsion and mere permission'.

67. Moreover, even though Professor Turner states that a specific and formal authorization of an export cartel constitutes a decisive condition for the immunity of the cartel in the event of the exercise of foreign anti-trust jurisdiction, I would emphasize that in the final analysis he maintains that:

'It seems reasonable to conclude that mere permission or even specific authorization for participation in an international cartel should not suffice to immunize the cartel from anti-trust attack by countries whose interests are substantially affected.'

VI — The Free Trade Agreement and the application of Article 85 of the EEC Treaty

68. The Finnish applicants challenge more specifically the Commission's jurisdiction to apply Article 85 of the EEC Treaty, having regard to the provisions of the Free Trade Agreement concluded between Finland and the Community ('the Agreement').[75] They maintain that the Agreement, which lays down specific rules in respect of restrictions of competition affecting trade between the Contracting Parties, 'takes precedence' over Community competition law. Accordingly, the only course of action open to the Commission, they argue, was recourse to the procedure laid down by Article 27 of the Agreement, namely raising the matter with the Joint Committee.

69. This is the first time to my knowledge that the argument concerning the primacy of the Agreement has been submitted to the Court. In the two previous cases brought against decisions penalizing them under Community competition law by undertakings from countries that had concluded free trade agreements with the Community, the Community's jurisdiction went unchallenged.[76] Moreover, the numerous instances in which the Commission has applied Articles 85 and 86 to such undertakings have not given rise to proceedings contesting the applicability of those provisions.

70. I would emphasize, in the first place, that Article 23 of the Agreement is aimed at

74 — 'Application of competition laws to foreign conduct: appropriate resolution of jurisdictional issues', conference held at the Fordham Corporate Law Institute on 3 and 4 October 1985.

75 — Agreement concluded on 5 October 1973 (OJ L 328, 28.11.1973, p. 17.

76 — Judgment of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461; judgment of 31 May 1979 in Case 22/78 *Hugin* [1979] ECR 1869.

practices in restraint of competition inasmuch as they may affect trade between Finland and the Community. The purpose of that provision therefore differs from that of the anti-trust provisions of the Contracting Parties themselves, like, in the case of the Community, Article 85 of the EEC Treaty which applies to agreements affecting competition within the common market.

71. Accordingly, if practices in restraint of competition infringe both the provisions of the Agreement and the actual rules of the Contracting Parties, is that such as to render the latter rules inapplicable and allow recourse solely to the procedure provided for in Article 27 of the Agreement? Academic writers who have had occasion to deal with this issue do not, either expressly[77] or by implication,[78] call in question the application of Article 85 to undertakings from countries which have concluded free trade agreements with the Community in so far as intra-Community trade is affected.

72. The applicants' argument would lead to a very significant limitation of the rights and powers of the Contracting Parties, which would require a wholly unequivocal provision or should, at the very least, be capable of being deduced from the manifest intention of the parties to the Agreement. The terms in which the Agreement is couched do not provide any indication to that effect. Furthermore, such an interpretation would not be in keeping with the Contracting Parties 'retaining their autonomous power of decision', as referred to in the preamble to the Agreement.

73. Finally, the applicants maintain that the concept of effect on trade between the Community and Finland plays, for the purposes of demarcating the application of the Agreement from that of the EEC Treaty, exactly the same role as the inter-State clause in Article 85 in the case of Community law and the law of the Member States. In my view, that parallel is disputable, inasmuch as it equates relationships arising under the EEC Treaty with those arising under the Agreement. In that connection reference must be made to the judgment in *Polydor*,[79] in which the Court stated, with regard to the Free Trade Agreement concluded between the Community and Portugal, that

'. . . it does not have the same purpose as the EEC Treaty, inasmuch as the latter . . . seeks to create a single market reproducing as closely as possible the conditions of a domestic market'.

74. The applicants' apparently logical reasoning ignores that difference between the objectives pursued. The characteristics of the relationship between the Treaty and the national laws of the Member States cannot be transposed to the relationship between the provisions of the Free Trade Agreement and those of the EEC Treaty. I would also point out, however, that in any event the applicants' argument disregards the fact that the concomitant and cumulative application of Community law and national law to the same agreement, decision or concerted practice is by no means excluded. In its judgment in *Walt Wilhelm*,[80] the Court expressed that solution in particularly clear terms, pointing out that:

77 — See, in particular, Roth: 'Die Wettbewerbsregeln in den Freihandelsabkommen der EWG', in *Wettbewerb in Recht und Praxis*, 1978, p. 423; John Temple Lange: 'European Community anti-dumping and competition laws, their actual and potential application to EFTA countries, *Tidsskrift for Rettsvitenskap*, 3/87, p. 590.

78 — H. Schröter (in *Kommentar zum EWG-Vertrag — Groeben*), from Boeckl, Thiesing, Ehlermann, Vol. 1, p. 919) considers that although the practical question of the direct effect of the competition rules contained in free trade agreements has not arisen so far, that can be explained 'by the fact that a large number of the agreements, decisions and concerted practices which are incompatible with the proper functioning of free trade agreements also come within the scope of Article 85 of the EEC Treaty'. See also Hirsch (in *L'accord entre la Suisse et la CEE confère-t-il des droits aux particuliers?*, CDE, 1974, p. 194) who adopts precisely the same approach from the point of view of the application of the Swiss anti-cartel provisions.

79 — Judgment of 9 February 1982 in Case 270/80 [1982] ECR 329.

80 — Judgment of 13 February 1969 in Case 14/68 [1969] ECR 1.

'... Community and national law on cartels consider cartels from different points of view. Whereas Article 85 regards them in the light of the obstacles which may result for trade between Member States, each body of national legislation proceeds on the basis of the considerations peculiar to it and considers cartels only in that context ...'.

And the Court stated that although

'the distinction between Community and national aspects could not serve in all cases as the decisive criterion for the delimitation of jurisdiction ... it implies that one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under Article 85 of the EEC Treaty, the other before the national authorities under national law'.

I would point out, therefore, that not only is the very principle of the analogy suggested by the applicants questionable, it also ultimately contradicts the view they are advocating. Accordingly, the Free Trade Agreement cannot be held to be exclusively applicable.

75. On the other hand, is it possible to take the view, as regards agreements, decisions and concerted practices which affect both intra-Community trade and trade between Finland and the Community, that an obligation exists, before Article 85 is implemented in any way, to invoke the Joint Committee procedure? I very much doubt whether it is possible to infer from the terms of Article 27 (3) (a) any such obligation on the Contracting Parties. The phrase 'either Contracting Party *may* refer the matter to the Joint Committee' suggests that the procedure should be regarded as optional.[81] That wording may be compared with the text of Article 27 (3) (b): 'As regards Article 24, the difficulties arising from the situation referred to in that article *shall* be referred for examination to the Joint Committee ...' and, in particular, with Article 27 (3) (c): 'As regards Article 25 [cases of dumping], consultation in the Joint Committee *shall take place before* the Contracting Party concerned takes the appropriate measures.' Those clear differences in terminology cannot be regarded as neutral.

76. But in any event are the applicants entitled to complain that the Commission did not raise the matter with the Joint Committee in order to seek a negotiated solution on the ground that such an attitude is contrary to Articles 23 and 27 of the Free Trade Agreement and the specific nature of relations between Finland and the Community, as emphasized in the declaration annexed to the Agreement?

77. In order to refute that argument, it is sufficient to recall that in its judgment in *Adams*[82] the Court held:

'... that the decision whether or not to refer the matter to the Joint Committee may not be taken except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which cannot be challenged before the Court by an individual'.

78. I would point out, last of all, that it is not disputed that the Republic of Finland

81 — March Hunnings: 'A more permissive provision', *Enforceability of the EEC-EFTA Free Trade Agreements*, 2 EL Rev., 1977, p. 63.

82 — Judgment of 7 November 1985 in Case 53/84 [1985] ECR 3595.

was consulted pursuant to the OECD's 1979 Recommendation concerning practices in restraint of competition, although the applicants maintain that such consultation related to the terms of the decision which had already been adopted. Evidently, Finland did not see any need to request the convening of a meeting of the Joint Committee, as it would have been authorized to do under Article 31 (2) of the Agreement.

79. Finally, the applicants allege that it is only the effects 'of the concertation of their prices with those of the other parties to the proceedings' that are involved, that such concertation 'could at most have affected trade between the Community and Finland' and that 'any indirect effects [of such concertation] on intra-Community trade' are not sufficient to justify the application of the prohibitions laid down by the EEC Treaty. For its part, the Commission maintains that its intention was to penalize world-wide concertation affecting intra-Community trade, which the Finnish applicants engaged in not only amongst themselves but also with other producers.

80. Consideration of the existence and of the gravity of the effect on intra-Community trade presupposes an analysis of the substance of the case, which the Court will carry out at a later stage.

81. In conclusion, therefore, I consider that the Commission, in the decision complained of, was right to state that the Free Trade Agreement does not contain any provision preventing it from applying Article 85 (1) of the Treaty forthwith, where trade between Member States is affected.

82. In the light of the foregoing considerations, my conclusions are as follows:

In the first place, the Court should dismiss the applicants' claim directed against the contested decision, in so far as it challenges the criterion of the effects as the basis of that decision. It will be for the Court at a later stage to ascertain whether the effects of the conduct alleged by the Commission were substantial, direct and foreseeable in order to determine whether the Commission was right in exercising jurisdiction over the applicants.

Secondly, the Court should reject the submission to the effect that the Free Trade Agreement between the Community and the Republic of Finland constitutes a bar to the application of Article 85 of the EEC Treaty to the Finnish applicants.